

No. 16171

United States
Court of Appeals
for the Ninth Circuit.

CHEW WING LUK,

Appellant,

-VS-

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF CALIF-
ORNIA, CENTRAL DIVISION.

APPELLANT'S OPENING BRIEF

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JURISDICTION

The complaint for declaratory judgment of citizenship was filed in the District Court of the United States, Northern District of California, Southern Division, basing jurisdiction on Section 503 of the Nationality Act of 1940 (8 U.S.C. 903), 28 U.S.C. 1331 and 2201, and the jurisdiction of the court in equity proceedings, (TR, pg. 4). The amended complaint, filed in the District Court of the United States, Southern District of California, Central Division, bases jurisdiction under Section 503 of the Nationality Act of 1940 (8 U.S.C. 903), (TR. pg. 11.)

Both the original complaint and the amended complain allege that appellant was denied a right or privilege as a citizen of the United States by an executive official of a Department of the United States Government. (TR. pgs. 6 and 12).

This court has jurisdiction to hear the appeal from the judgment below under U.S.C. 1291 (65 Stat. 726).

STATEMENT OF THE CASE

Appellant appeared before the American Consul in Hong Kong and applied for a U. S. passport on February 2, 1951, alleging therein that he was a citizen of the United States by virtue of the fact that his father, Chew Tai Kam, was a native born citizen of the United States. The United States Consul denied appellant's application for a passport, whereupon a complaint for declaratory judgment was filed by appellant by his next friend, Chew Fong Shew, who alleged in said complaint that she was appellant's aunt.

Subsequent to the filing of the complaint, the Secretary of State directed the consul to issue a certificate of identity to appellant, pursuant to Section 503 of the Nationality Act of 1940 (8 U.S.C. 903) in order to enable appellant to come to the United States to prosecute his action for declaratory judgment.

After appellant arrived in the United States and

during the pendency of his action, he learned for the first time that he was an illegitimate child, and that Chew Tai Kam was not his father and that Chew Fong Shew, whom he believed to be his aunt, was his true mother.

Upon discovery of the new facts, appellant promptly filed an amended complaint, alleging that he is nevertheless a citizen of the United States through his mother, a native born citizen of the United States, under Section 205 of the Nationality Act of 1940 (8 U.S.C. 605), and that at the time he was denied a passport of the United States he was a citizen of the United States under said Section 205 of the Nationality Act, which provided as follows:

"The provisions of Section 201, subsections (c) (d) (e) and (g) hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court.

"In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status."

The lower court decided it had no jurisdiction to hear appellant's claim to citizenship on the ground that appellant had not been denied a right or privilege as a national of the United States under Section 503 of the Nationality Act of 1940 because the Consul denied appellant's application for a passport on facts different from the allegations now set forth in the amended complaint, i.e., the denial was on a claim of citizenship of an alleged father, Chew Tai Kam, and there was never a denial of citizenship based on appellant's present claim of citizenship through his mother. Therefore, there having been no denial of a right or privilege as a national under the new facts, the court held it had no jurisdiction to hear the case on its merits.

The fraud or good faith of the appellant was not an element of consideration by the Court.

SPECIFICATION OF ERRORS AS TO

CONCLUSIONS OF LAW

1. That the Court did not have jurisdiction of the subject matter of this action (TR, pg. 21, par. I).

2. That plaintiff has never been denied a right as a national of the United States (TR, pg. 22, par. V).

ARGUMENT

Section 503 of the Nationality Act of 1940 (8 U.S.C. 903) provides, in its pertinent parts, as follows:

"If any person who claims a right or privilege as as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in a foreign country in which he is residing a certificate of identity stating that his nationality status is

pending before the Court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States"

The section requires, as a jurisdictional prerequisite, the denial of a claim of a right or privilege as a national of the United States. It is a denial of the ultimate fact, i.e., the nationality of the United States to a person which is controlling. The statute makes no reference to evidentiary matters or the component parts which, taken together, spell out the manner of acquisition of nationality, and therefore the manner of acquisition of nationality, whether it be through a father, mother, or through birth, is immaterial for jurisdictional purposes.

The lower court, in deciding there was no denial of a right or privilege as a national, really decided there could be no denial unless the Consul had all the facts, whether or not they were known to appellant at the time. But the central issue is whether, in any event, the appellant had a claim as a national. The very reason for the court's jurisdiction is to decide that claim, and the evidentiary matters to be presented at the trial is entirely irrelevant to the proceeding had before the Consul. The court's jurisdiction is not dependent upon the state-

ments made before a Consul but upon the Consul's denial of a passport to a national. Jurisdiction is not based upon the reasons for the denial.

The lower court's reasoning would compel appellant to return to Hong Kong, inform the Consul that he now has learned he is a citizen through his mother, and again apply for a passport; and if that is denied, come to the United States again before the same court to have the same claim adjudicated. The whole round of administrative proceedings would be started again (although under the present law appellant may no longer have the privilege of returning to the United States and may be denied the opportunity of judicial declaration of his nationality). See Section 360, Immigration and Nationality Act of 1952. A similar situation arose in the case of Jiminez v. Glover, 255 F (2) 54, in the construction of Section 360 of the Immigration and Nationality Act of 1952, the successor to the statute in issue here. The court declared that "the language of the McCarran Act does not require us to impute this absurdity to the Congress of the United States. The Congress must speak with a clear voice before courts would be justified in putting such an interpretation upon legislation as would have the effect of withdrawing the possibility of judicial review from a claimant to American citizenship which such claimant had the right to pursue under prior

legislation."

It has been held that as long as a positive denial of a right of national was made before suit, the government could not deprive the court of jurisdiction by thereafter requesting plaintiff for further particulars. And even where there has been a sufficient denial to permit institution of suit and plaintiff was asked for further information, where such request for further particulars was not made until after suit was commenced, the government could not thereby deprive the court of jurisdiction in such proceeding. Cheung v. Dulles, D.C. Mass. 1954, 16 F.R.D. 550; Kenng v. Dulles, 127 Supp. 252. It is submitted that appellant could not deprive the court jurisdiction by the mere act of filing an amended complaint, especially where such amendment was permitted by the court. He could not be penalized because he discovered the truth of his parentage after he came to the United States and after the original complaint, filed by his next friend, was filed. At that time the court already had jurisdiction, and once having acquired jurisdiction concerning the nationality of appellant, the jurisdiction is a continuing one as long as appellant has stated a claim upon which relief can be granted. Linzalone v. Dulles, 120 F. Supp. 107.

The jurisdictional requirement in declaratory actions to establish appellant as a national of the United States is

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The jurisdictional requirement in declaratory actions to establish appellant as a national of the United States is

an allegation that plaintiff has been denied a right or privilege as a national of the United States. Appellant has done this in his original and amended complaint. (TR, pg. 6, pars. X, XI; pg. 12, par. VIII).

Ngeug v. Dulles, 117 F. Supp. 498

Lee Hong v. Acheson, 110 F. Supp. 60.

Dulles v. Lung, 212 F (2) 73.

CONCLUSION

The fact that appellant's application for a United States passport erroneously sets forth that he was a citizen through a father does not obviate the fact that he was denied the right or privilege as a citizen of the United States even though he later discovered, after he was in the United States and after suit for declaratory judgment was instituted, that he was really illegitimate and a citizen through his mother.

Appellant's right or privilege as a citizen of the United States having been denied, the jurisdictional prerequisite has been established as alleged in the amended complaint (filed by permission of the court) and the court has jurisdiction to decide the nationality of appellant.

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